No. 71-1455

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEONARD L. BURSTEIN, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

**Petition For A Writ of Certiorari To
The United States Court of Appeals
For The Fifth Circuit**

PETITIONER'S REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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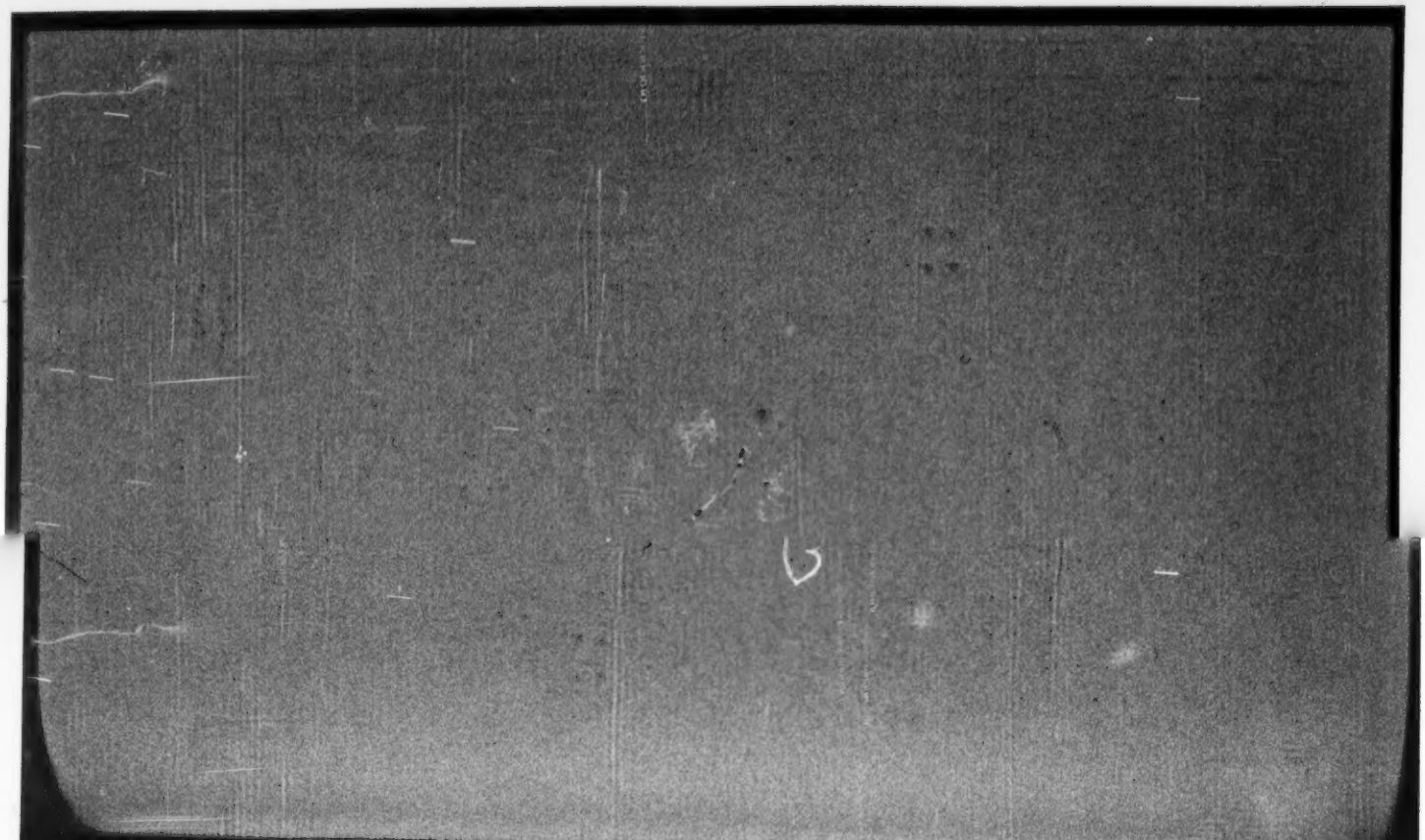

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Where, as here, a prosecutor comments on an accused's failure to testify, and the trial court neither grants a timely defense motion for a mistrial nor instructs the jury to disregard the comments, the prejudicial impact of the remarks cannot be dispelled by routine jury instructions which make no reference to the offending comments, but simply state that "closing arguments [are] not evidence" and the verdict should be based "solely on legally competent evidence." By ruling that such proscribed comments were "cured" by the trial court's general jury

instructions, unrelated to the specific comments, the Fifth Circuit has impaired the constitutional protection established in *Griffin v. California*, 380 U.S. 609 (1965), and has created a conflict with the decisions of the United States Court of Appeals for the First Circuit in *Desmond v. United States*, 345 F.2d 225 (1965) and *Rodriguez-Sandoval v. United States*, 409 F.2d 529 (1969).

In its Brief in Opposition, the United States does not dispute the importance of the question presented, but instead, attempts to recast the facts of the case by running together a discussion of events at Petitioner's earlier trial with the offending prosecutorial remarks made at Petitioner's second trial. The irrelevance of events at the first trial is plain. The jury which heard the prosecutor charge that Petitioner had "panicked," knew nothing of the earlier trial. See, *Desmond v. United States, supra*, at page 227. In a further effort to divert inquiry from the significant constitutional issues present, the Government suggests, albeit obliquely, that Petitioner's counsel may have waived objection to the prosecutor's infringement of Petitioner's Fifth Amendment right not to testify. (page 6, Brief in Opposition). As pointed out in the Petition at page 5, Petitioner's counsel promptly objected to the prosecutor's remarks and moved for a mistrial. The objection was overruled and the motion was denied. Plainly, Petitioner's position was timely brought to the trial court's attention, and neither on the motion for new trial nor on appeal[1]

[1] Brief for Appellee in *United States of America v. Bursten*, No. 30,224, United States Court of Appeals for the Fifth Circuit.

did the Government make a claim that Petitioner waived his objection.[2]

With its outside the record discussion of events at the first trial, the Government couples its contention that the charges of "panic" and "inability to put on a case" did not refer to Petitioner's silence. The contention is without merit. Dispositive is the fact that both the trial court and the Court of Appeals recognized that in the context of *this* case, the prosecutor's rebuttal argument statements that "the defense panicked" and "couldn't put on a defense" invited the jury to draw adverse inferences from Petitioner's silence. The trial court revealed that it linked Petitioner's silence and the defense's failure to put on a case by equating Petitioner's requested instruction on the absence of defense testimony (which was rejected) with an instruction on Petitioner's own right not to testify. (App. D, p. 21). Similarly, the Court of Appeals noted the linkage:

> . . . The prosecutor's comments of "panic" and "inability to present a defense" . . . conceivably asks the jury to conclude that *appellant had panicked* because *he* had no case . . . [App. A, p. 11; emphasis added]

Because it was not "apparent on the record that there was someone other than himself whom defendant could have called"[3] and that it was this someone else who panicked, the prosecutor's remarks of necessity pointed to Petitioner.

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[2]It should be noted that even if objection had not been made the error here was "plain error" within the meaning of Fed. R. Crim. P. 52(b). See, *Rodriguez-Sandoval v. United States, supra*, at page 531.

[3]*Desmond v. United States, supra*, at page 227.

There is likewise no merit in the Government's efforts to distinguish this case from the above cited decisions of the First Circuit. It is absurd to suggest, as the Government does in its Brief, that the cases can be reconciled on the quantum of prejudicial commentary. The factual difference that the improper comments in *Rodriquez-Sandoval* were repeated five times, while here the prosecutor charged that Petitioner "panicked" "only" two times hardly explains away the conflict in decisions. Nor does the Government succeed in reconciling the decision below with that of the First Circuit in *Desmond v. United States, supra.* In *Desmond,* although the trial court clearly and unequivocally charged on the defendant's right not to testify, the First Circuit held that these general instructions did not "cure" the error inherent in the prosecutor's comments that certain evidence stood "unimpeached and uncontradicted." To dispel the prejudicial effect of such improper comment, as this Court has held, a "direct prohibition or emphatic condemnation" is required. *Wilson v. United States,* 149 U.S. 60, 67 (1893).[4] The ineffectiveness of the supposed "cure" in the instant case is more marked than in either *Desmond* or *Rodriguez-Sandoval.* Here, unlike in *Desmond* and *Rodriguez-Sandoval,* the prosecutor's remarks not only called attention to Petitioner's silence, but went on to ascribe a "guilty fear" of testifying as the reason for the silence. On the record in this case, the conflict with the decisions of the First Circuit is clear.

Significantly, the Brief in Opposition ignores the serious and eroding implications of the Fifth Circuit's decision on *Chapman v. California, supra.* In its opinion

[4]See also, *United States v. Handman,* 447 F.2d 853, 855 (7th Cir. 1971); *Desmond v. United States, supra,* at 226-227; *DeMayo v. United States,* 32 F.2d 472, 475 (8th Cir. 1929).

here, the Fifth Circuit held that the prosecutor's rebuttal statements "did not constitute prejudicial error" under *Chapman v. California, supra,* because the error inherent in such comments was cured by the District Court's routine instructions–delivered without regard to the offending comments–"that the closing arguments were not evidence and that the jury should base its verdict solely on legally competent evidence." The Fifth Circuit's decision treats as "cured" (*i.e.*, harmless beyond a reasonable doubt) constitutionally proscribed prosecutorial closing argument whenever the trial court, at some point, tells the jury that "closing arguments [are] not evidence" and that the verdict should be based "solely on legally competent evidence." Such an approach unrealistically assumes that a jury will interpolate from such general instructions a specific instruction to disregard a particular, but unmentioned, comment. If correction of constitutional error requires no more, the "harmless beyond a reasonable doubt" standard of *Chapman* is a nullity.

CONCLUSION

For the reasons stated herein and in the Petition, a Writ of Certiorari should be granted in the instant case.

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